

UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON  
PORTLAND DIVISION

MART VINE DINE,

Plaintiff,

No. 03:10-cv-00712-HU

vs.

CAROLYN W. COLVIN<sup>1</sup>,  
Commissioner of Social Security,

**FINDINGS AND RECOMMENDATION  
ON MOTION FOR 406(b) FEES**

Defendant.

---

Merrill Schneider  
P.O. Box 14490  
Portland, OR 97293

Attorney for Plaintiff

S. Amanda Marshall  
United States Attorney  
Adrian L. Brown  
Assistant United States Attorney  
1000 S.W. Third Avenue, Suite 600  
Portland, OR 97204-2904

Franco L. Becia  
Special Assistant United States Attorney  
Social Security Administration  
Office of the General Counsel  
701 Fifth Avenue, Suite 2900 M/S 221A  
Seattle, WA 98104-7075

Attorneys for Defendant

---

<sup>1</sup>Carolyn W. Colvin became acting Commissioner of Social Security on February 24, 2013. Therefore, pursuant to Federal Rule of Civil Procedure 25(d), she is automatically substituted for Michael J. Astrue as Defendant in this case.

1 HUBEL, United States Magistrate Judge:

2 The plaintiff Mart Van Dine brought this action for judicial  
3 review of the Commissioner's decision denying his applications  
4 for disability insurance benefits under Title II of the Social  
5 Security Act, 42 U.S.C. § 1381 et seq., and Supplemental  
6 Security Income under Title XVI of the Act. In Findings and  
7 Recommendation entered February 27, 2012, I recommended that the  
8 Commissioner's decision be reversed, and the case be remanded  
9 for further proceedings. Dkt. #25. Neither party filed  
10 objections, and on March 29, 2012, Judge Marco A. Hernandez  
11 adopted my recommendation, and entered judgment for Van Dine.  
12 Dkt. ##27 & 28.

13 The parties filed a stipulated motion for a fee payment  
14 under the Equal Access to Justice Act, 28 U.S.C. § 2412 (EAJA),  
15 in the amount of \$6,625.99. I recommended the motion be  
16 granted, and on October 16, 2012, Judge Hernandez adopted my  
17 recommendation and granted the motion, ordering payment to Van  
18 Dine of EAJA fees in the amount of \$6,625.99. Dkt. #34; see  
19 Dkt. ##29-32.

20 The matter now is before the court on Van Dine's unopposed  
21 motion for attorneys' fees pursuant to 42 U.S.C. § 406(b). Dkt.  
22 #39. Section 406(b) provides that an attorney who represents a  
23 successful claimant in a Social Security action may be awarded,  
24 as part of the judgment, "'a reasonable fee . . . not in excess  
25 of 25 percent of the . . . past-due benefits' awarded to the  
26 claimant." *Gisbrecht v. Barnhart*, 535 U.S. 789, 795, 122 S. Ct.  
27 1817, 1822, 152 L. Ed. 2d 996 (2002) (quoting 42 U.S.C.  
28 § 406(b)(1)(A)). The attorney's fee "is payable 'out of, and

1 not in addition to, the amount of [the] past-due benefits.'" *Id.* An attorney may receive fees under both EAJA and section  
2 406(b), but the attorney must refund the amount of the smaller  
3 fee to the claimant. *Id.* (citation omitted). This ensures the  
4 claimant receives the largest possible award of benefits. *Id.*

5  
6 The *Gisbrecht* Court observed that contingent fee contracts  
7 "are the most common fee arrangement between attorneys and  
8 Social Security claimants." *Id.*, 535 U.S. at 800, 122 S. Ct. at  
9 1824 (citation omitted). To prevent an attorney from  
10 contracting for an unreasonably large fee, Congress enacted  
11 section 406(b) to limit the attorney's fee to 25 percent of the  
12 past-due benefits. *Id.*, 535 U.S. at 805, 122 S. Ct. at 1826-27  
13 (discussing the legislative history behind section 406(b)).  
14 However, the statute does not mandate that an attorney receive  
15 25 percent of the claimant's past-due benefits. Rather,  
16 "[w]ithin the 25 percent boundary, . . . the attorney for the  
17 successful claimant must show that the fee sought is reasonable  
18 for the services rendered." *Id.*, 535 U.S. at 807, 122 S. Ct. at  
19 1828. Thus, although the district court must look first to the  
20 contingent fee agreement between the attorney and the claimant,  
21 the court then must test the fee arrangement for reasonableness.  
22 *Crawford v. Astrue*, 586 F.3d 1142, 1149 (9th Cir. 2009) (citing  
23 *Gisbrecht*, 535 U.S. at 808, 122 S. Ct. at 1828).

24 The amount of the fee may be reduced "based on the character  
25 of the representation and the results the representative  
26 achieved." *Gisbrecht*, 535 U.S. at 808, 122 S. Ct. at 1828  
27 (citations omitted). Thus, for example, a reduced fee would be  
28 in order "if the attorney provided substandard representation or

1 engaged in dilatory conduct in order to increase the accrued  
2 amount of past-due benefits, or if the 'benefits are large in  
3 comparison to the amount of time counsel spent on the case.'" *Crawford*, 586 F.3d at 1148 (quoting *Gisbrecht, supra*). The  
4 attorney ultimately "bears the burden of establishing that the  
5 fee sought is reasonable." *Id.*

7 Routine rubber-stamping of the statutory maximum allowable  
8 fee is disfavored in these cases. As the Fourth Circuit Court  
9 of Appeals observed over forty years ago,

10 [J]udges should constantly remind themselves  
11 that, while the lawyer is entitled to a  
12 reasonable compensation for the services  
13 rendered by him in the judicial proceeding,  
14 these benefits are provided for the support  
15 and maintenance of the claimant and his [or  
16 her] dependents and not for the enrichment  
17 of members of the bar. Routine approval of  
18 the statutory maximum allowable fee should  
19 be avoided in all cases. In a great  
20 majority of the cases, perhaps, a reasonable  
21 fee will be much less than the statutory  
22 maximum. The statute directs a  
23 determination and allowance of a reasonable  
24 fee and the courts are responsible under the  
25 [Social Security] Act for seeing that  
26 unreasonably large fees in these Social  
27 Security cases are not charged or collected  
28 by lawyers.

20 *Redden v. Celebrezze*, 370 F.2d 373, 376 (4th Cir. 1966).

21 In the present case, the fee agreement between Van Dine and  
22 his counsel provides for a fee equal to 25 percent of past-due  
23 benefits. See Dkt. #39-2. Counsel's efforts resulted in an  
24 award to Van Dine of a total of \$152,008 in past-due benefits.  
25 Dkt. #39, p. 2. Van Dine's attorney Merrill Schneider requests  
26 an award of 406(b) fees in the amount of \$32,002, which he  
27 states "is exactly 25% of past due benefits" when "combined with  
28

1 the \$6,000 agency fee already awarded." *Id.* After  
2 deduction/refund of the \$6,625.99 EAJA fee previously awarded,  
3 the requested fee would result in an out-of-pocket amount for  
4 Van Dine of \$25,376.01.

5 Counsel's time records were submitted in connection with Van  
6 Dine's motion for EAJA fees. See Dkt. #31. Those records  
7 indicate Van Dine's attorneys expended 37.00 hours in this case  
8 (.80 hours in 2010; 35.70 hours in 2011; .50 hours in 2012). An  
9 expenditure of 37.00 hours falls within the twenty- to forty-  
10 hour range Judge Michael W. Mosman has held is a "reasonable  
11 amount of time to spend on a social security case that does not  
12 present particular difficulty." *Harden v. Comm'r*, 497 F. Supp.  
13 2d 1214, 1215 (D. Or. 2007) (noting "some consensus among the  
14 district courts" on this point; citing cases). Judge Mosman  
15 agreed that "[a]bsent unusual circumstances or complexity, . .  
16 . this range provides an accurate framework for measuring  
17 whether the amount of time counsel spent is reasonable." *Id.*  
18 In the present case, the administrative record was 669 pages  
19 long. Van Dine's opening brief was twenty-one pages long. In  
20 the brief, Van Dine raised four issues requiring a detailed  
21 analysis of the ALJ's treatment of the medical evidence in the  
22 case, the weight given to the opinions of Van Dine's treating  
23 sources, and the ALJ's credibility determination, as well as  
24 discussion of the applicable law. The Commissioner responded  
25 with an eighteen-page brief, and Van Dine filed a twelve-page  
26 reply. The complexity of the issues in the case, and analysis of  
27 the evidence, led to one of the longest opinions the undersigned  
28 has filed in a Social Security case, comprising 104 pages. As

1 I noted in my findings and recommendation on Van Dine's motion  
2 for EAJA fees, the lengthy opinion was due in large part to the  
3 complicated medical history that was poorly analyzed by the ALJ.  
4 Based on the complexity of the case, I find the attorneys'  
5 expenditure of 37 hours in this case was reasonable under the  
6 circumstances.

7 A fee of \$32,002 for 37 hours of work would result in an  
8 effective hourly rate of \$864.92. To demonstrate that the  
9 requested fee is reasonable, counsel refers to the Oregon State  
10 Bar Association Economic Survey, which has been used by judges  
11 of this court as a benchmark in determining reasonable hourly  
12 rates for attorney fee awards. The 2012 survey reports that  
13 attorneys practicing in "other areas" of private practice in  
14 Portland bill at an average rate of \$308.00 per hour. Counsel  
15 argues for an upward adjustment of the average hourly rate based  
16 on the risk of representing Social Security claimants, arguing  
17 that in Social Security cases, "there is only a 36% chance of  
18 winning benefits for the claimant." Dkt. #39, p. 5. In support  
19 of this assertion, counsel cites "[d]ata based on statistics  
20 used in the Supreme Court appeal in *Gisbrecht*." *Id.* at n.3.  
21 Relying on this degree of risk, counsel argues "a contingency  
22 multiplier of 2.78 (100/36) is warranted." *Id.*, p. 5. Applying  
23 a 2.78 contingency multiplier to the \$308 hourly rate results in  
24 an hourly rate of \$856.24 per hour, a rate counsel argues would  
25 compensate him properly for the risk he undertook in this case,  
26 as well as putting him "on equal footing with the average  
27 Portland-area attorney, just for the hours spent in Federal  
28 Court one each case." *Id.* (citing *In re Wash. Pub. Power Supply*

1 *Sys. Sec. Lit.*, 19 F.3d 1291, 1299 (9th Cir. 1994)). Notably,  
2 the effective hourly rate requested in the current motion  
3 (\$864.92) is \$8.68/hour greater than the \$856.24 average rate  
4 reached using counsel's calculation.

5 In any event, when considering identical arguments made by  
6 attorneys seeking section 406(b) fees in previous cases, the  
7 undersigned has noted this type of analysis does little to  
8 assist the court in determining the reasonableness of the  
9 contracted-for fee equal to 25% of the claimant's past-due  
10 benefits. First, counsel's reliance on the risk involved in  
11 Social Security cases, generally, has been rejected by the  
12 courts. Rather, it is the risk faced by counsel in the present  
13 case that is relevant. See *Crawford*, 586 F.3d at 1153  
14 (directing district courts to "look at the complexity and risk  
15 involved in the specific case at issue to determine how much  
16 risk the [attorney] assumed in taking the case"). In this case,  
17 the issues counsel raised on Van Dine's behalf were fairly  
18 routine in nature for Social Security cases, particularly for  
19 experienced Social Security counsel. While the issues were  
20 labor-intensive due to the ALJ's poor work, thus justifying the  
21 37 hours counsel spent on the case, the poor work of the ALJ  
22 reduced the risk that Van Dine and his counsel would receive  
23 nothing from this case. In other words, the errors made by the  
24 ALJ were so glaring that the likelihood of recovery for Van  
25 Dine, and thus his counsel, was greater than average. The court  
26 recognizes that counsel does assume the "risk that no benefits  
27 would be awarded or that there would be a long court or  
28 administrative delay in resolving the case[]." *Id.*, 586 F.3d at

1 1152. The court further acknowledges the significant lapse of  
2 time between counsel's acceptance of the case and the receipt of  
3 payment. The present case was filed four years ago, in June  
4 2010, and it could be several more months before counsel  
5 receives payment of any fees awarded pursuant to the current  
6 motion. Nevertheless, the court finds the risk in the present  
7 case was lower than in other routine Social Security cases. The  
8 amount of risk, therefore, supports some reduction in the  
9 extremely high fee requested by counsel.

10 Second, counsel's fee analysis is based on a lodestar  
11 approach, which was "flatly rejected" by the Supreme Court in  
12 *Gisbrecht*. See *Id.*, 586 F.3d at 1148. The *Crawford* court  
13 explained that under *Gisbrecht*, the court's duty to assure the  
14 reasonableness of the fee "must begin . . . with the fee  
15 agreement, and the question is whether the amount need be  
16 reduced, not whether the lodestar amount should be enhanced."  
17 *Id.*, 586 F.3d at 1149 (emphasis added). The court may "consider  
18 the lodestar calculation, but *only as an aid* in assessing the  
19 reasonableness of the fee." *Id.*, 586 F.3d at 1151 (emphasis in  
20 original; citing *Gisbrecht*, 505 U.S. at 808, 122 S. Ct. at  
21 1828). Factors to be considered in reducing a fee include  
22 "substandard performance, delay, or benefits that are not in  
23 proportion to the time spent on the case." *Id.*

24 In the present case, counsel's representation of the  
25 claimant was not substandard. He reviewed the administrative  
26 record and the Commissioner's arguments thoroughly, and prepared  
27 briefing that ultimately carried the day. As Judge Marsh  
28 observed in *Province v. Comm'r*, slip op., 2013 WL 3045568, at \*2



1 (D. Or. June 17, 2013) (Marsh, J.), "it takes an experienced  
2 practitioner and a close examination of the relevant documents  
3 and records to effectively identify any insufficiencies in the  
4 administrative record." *Id.* The court finds no reduction of the  
5 fee is warranted based on counsel's representation. The court  
6 also finds counsel did not engage in dilatory conduct in order  
7 to increase the accrued amount of past-due benefits, so no  
8 downward adjustment is required on that basis. *See Gisbrecht*,  
9 535 U.S. at 808, 122 S. Ct. at 1828.

10 Where the court particularly disagrees with counsel's  
11 argument is in considering whether "the benefits are large in  
12 comparison to the amount of time the attorney spent on the  
13 case." *Id.* (emphasis added). The 37 hours of attorney time  
14 spent by Van Dine's counsel in this case falls within the twenty  
15 to forty hour range Judge Michael W. Mosman found to be a  
16 "reasonable amount of time to spend on a social security case  
17 that does not present particular difficulty." *Harden v. Comm'r*,  
18 497 F. Supp. 2d 1214, 1215 (D. Or. 2007) (noting "some consensus  
19 among the district courts" on this point; citing cases).  
20 However, the award of \$152,008 in past-due benefits is enormous  
21 based on the time expended and the lower-than-average risk of  
22 recovery involved. A fee amounting to 25% of that award would  
23 represent a windfall to counsel. For these reasons, the court  
24 finds that a 50% reduction in the requested fee is reasonable  
25 under the circumstances. This will result in an hourly rate of  
26 \$432.46, which is \$124.46 per hour more than the average rate of  
27 Portland-area attorneys. The \$124.46 per hour increase over the  
28 average hourly rate accounts for the lessened risk counsel

1 undertook in accepting representation of this claimant, and  
2 adequately compensates counsel for the quality of  
3 representation, and the time spent on the case.

4 Accordingly, after considering all of the relevant factors,  
5 the court finds counsel should be awarded fees under section  
6 406(b) in the amount of \$16,001.02, from which the previously-  
7 awarded \$6,625.99 in EAJA fees should be refunded to Van Dine.

8 / / /

9 / / /

10 / / /

#### 11 **CONCLUSION**

12 For the reasons set forth above, I recommend the plaintiff's  
13 counsel's motion for attorney fees pursuant to 42 U.S.C. §  
14 406(b) (Dkt. #39) be granted in part and denied in part, and a  
15 fee of \$16,001.02 be awarded, with the sum of \$6,625.99,  
16 representing EAJA fees already awarded in this case, to be  
17 refunded to the plaintiff.

#### 18 **SCHEDULING ORDER**

19 These Findings and Recommendations will be referred to a  
20 district judge. Objections, if any, are due by **July 7, 2014**. If  
21 no objections are filed, then the Findings and Recommendations  
22 will go under advisement on that date. If objections are filed,  
23 then any response is due by **July 24, 2014**. By the earlier of  
24  
25  
26  
27  
28

1 the response due date or the date a response is filed, the  
2 Findings and Recommendations will go under advisement.

3 IT IS SO ORDERED.

4 Dated this 17th day of June, 2014.

5  
6 /s/ Dennis J. Hubel

7 Dennis James Hubel  
8 Unites States Magistrate Judge  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28